No. 97-448

Supreme Court, U.S.
FILED
OCT 9 1997
CLERK

IN THE

Supreme Court of the United States

October Term, 1997

ABDUL RASHID,

Petitioner,

v.

MARINE MIDLAND BANK f/k/a
MARINE MIDLAND BANK, N.A.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MCCABE & MACK LLP
LANCE N. PORTMAN*
RICHARD R. DU VALL
Attorneys for Respondent
63 Washington Street
P.O. Box 509
Poughkeepsie, NY 12602-0509
(914) 486-6800

**Counsel of Record*

THE REPORTER COMPANY AND THE WALTON REPORTER, INC.
181 Delaware Street, Walton, NY 13856—800-252-7181
(3651 – 1997)

Printed on Recycled Paper

PARTIES TO THE PROCEEDING.

The petition accurately lists the parties to the proceeding.

The following are parents of respondent Marine Midland Bank formerly known as Marine Midland Bank, N.A.:

HSBC Holdings, plc

HSBC Finance (Netherlands)

HSBC Holdings Bv.

HSBC Americas, Inc.

There are no non-wholly owned subsidiaries of respondent Marine Midland Bank formerly known as Marine Midland Bank, N.A.

TABLE OF CONTENTS

Page

PARTIES TO THE PROCEEDING. i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 2

CONCLUSION 4

TABLE OF AUTHORITIES

CASES

Citibank N.A. v. Plapinger, 66 N.Y.2d 90, 495 N.Y.S.2d 309, 485 N.E.2d 974 (N.Y. 1985) 3

Hanrog Distributing Corp. v. Hanioti, 10 N.Y. Misc.2d 659, 54 N.Y.S.2d 500 (Sup. Ct. N.Y. County, 1945) 2

Mallad Construction Corp. v. County Federal Savings & Loan Association, 32 N.Y.2d 285, 344 N.Y.S.2d 925, 298 N.E.2d 96 (N.Y. 1973) 2, 3

S.J. Capelin Associates, Inc. v. Globe Manufacturing Corp., 34 N.Y.2d 338, 357 N.Y.S.2d 478, 313 N.E.2d 776 (N.Y. 1974) 2

Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595, 404 N.E.2d 718 (N.Y. 1980) 2

STATUTES

New York General Obligations Law §15-301 3

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner's Statement of the Case contains many gross misstatements of fact. For instance, there is no evidence in the Record, and no argument was made below, that in February of 1990, the condominium project itself was intended to be the sole collateral (Pet. 4). There is simply nothing in the Record to support this newly made allegation.

Similarly, there is nothing in the Record to support the allegation now made that a "senior officer made various threats against petitioner" (Pet. 4). Petitioner was represented by counsel throughout the matter. The respondent Marine Midland Bank f/k/a Marine Midland Bank, N.A. (the "Bank") never forced petitioner to sign anything or do anything. Petitioner did nothing without extensive discussions with his own counsel and everything was through negotiations by his own counsel with the Bank and the Bank's counsel.

In November 1993, petitioner signed two mortgage modification agreements "in which [petitioner] reaffirmed the validity of the mortgage liens and agreed that there were no defenses nor offsets to the mortgages or the indebtedness secured thereby. [Petitioner] is bound by this waiver." (Decision and Order of Supreme Court, State of New York, Dutchess County, August 25, 1995, App. A to Pet. at 3A.)

Supreme Court, Dutchess County did not "reject consideration" of petitioner's evidence. On the contrary, Supreme Court, Dutchess County considered petitioner's evidence and held that it failed to raise a triable issue of fact.

The Appellate Division of the Supreme Court of the State of New York, Second Department adopted Judge Beisner's decision without modification. The Court of Appeals of the

State of New York declined to disturb either determination. This Court should do the same.

REASONS FOR DENYING THE WRIT.

Summary judgment is an important procedural device designed to separate those cases in which there are no material issues of fact from those cases in which testimony and other evidence is necessary to enable the finder of fact to resolve material issues of fact. *Mallad Construction Corp. v. County Federal Savings and Loan Assoc.*, 32 N.Y.2d 285, 291, 344 N.Y.S.2d 925, 930, 298 N.E.2d 96 (N.Y. 1973). More is required to defeat a motion for summary judgment than the unsupported recitation of facts which if believed would create a "shadowy semblance of an issue". *S.J. Capelin Associates, Inc. v. Globe Manufacturing Corporation*, 34 N.Y.2d 338, 357 N.Y.S.2d 478, 313 N.E.2d 776 (N.Y. 1974) quoting *Hanrog Dist. Corp. v. Hanioti,* 10 N.Y. Misc.2d 659, 660, 54 N.Y.S.2d 500 (Sup. Ct. N.Y. County, 1945). Rather, the burden on the party opposing the motion for summary judgment, once the movant has established a *prima facie* case, is to "lay bare its proofs". *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595, 404 N.E.2d 718 (N.Y. 1980).

Petitioner did not, and does not, claim that he did not receive adequate notice of the motion. Petitioner did not, and does not, claim that he was prevented from obtaining evidence in discovery which would have enabled him to establish, by admissible evidence, a material question of fact. Indeed, no discovery demands had been served by petitioner at the time of respondent's summary judgment motion.

As the motion court held, petitioner waived, under advice of counsel, and supported by consideration, any claims arising out of conduct alleged to have occurred prior to November, 1993. The Statute of Frauds, embodied in New York General Obliga-

tions Law §15-301, the Parol Evidence Rule and equitable principles of estoppel each render inadmissible petitioner's efforts to establish a "triable issue of fact by admissible evidence." *Citibank N.A. v. Plapinger,* 66 N.Y.2d 90, 495 N.Y.S.2d 309, 485 N.E.2d 974 (N.Y. 1985); *Mallad Constr. Corp., supra.*

If every summary judgment motion decided in favor of the movant were such as would rise to the level of a constitutional denial of due process, simply because the losing party was denied a trial, the entire procedural device known as the motion for summary judgment would be rendered useless. The Courts would be utterly clogged with trials containing no material questions of fact, and likely no material admissible testimony. In the instant case, all of petitioner's efforts to establish the conduct set forth in petitioner's Statement of the Case would have been and are inadmissible under the Parol Evidence Rule and Statute of Frauds. *Citibank, N.A. v. Plapinger, supra*; New York General Obligations Law §15-301.

The Petition presents no Constitutional question whatsoever. The proceedings below were regular in every regard, and the Petition should be denied.

CONCLUSION

For the reasons stated above, the Petition for a writ of certiorari should be denied. In the event that the Petition is granted, respondent urges that the order of the Appellate Division, Second Department be upheld.

DATED: Poughkeepsie, New York
October 7, 1997

Respectfully submitted,

McCABE & MACK LLP
Attorneys for Respondent
63 Washington Street
P.O. Box 509
Poughkeepsie, NY 12602-0509
Tel: (914) 486-6800

OF COUNSEL:
LANCE N. PORTMAN, ESQ.*
RICHARD R. DU VALL, ESQ.

* COUNSEL OF RECORD